

Award No. 11517

Docket No. SG-13084

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Wesley Miller, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

CENTRAL OF GEORGIA RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Central of Georgia Railway Company:

Claim of J. R. Estes, Jr., for restoration of his seniority rights under the Signalmen's Agreement, account his position as Traveling Signal Maintainer, Columbus, Ga., being abolished effective with the close of work day, Friday, September 16, 1960, and Mr. Estes' physical condition not permitting him to exercise his seniority and continue to work. [Carrier's File: DOCKET SIG 8067; File SIG 452]

EMPLOYEES' STATEMENT OF FACTS: The claimant in this dispute, Mr. J. R. Estes, Jr., entered service in the Carrier's Signal Department on May 22, 1923. He established a seniority date of October 1, 1923, in Seniority Class 1 (Rule 33 of the current Signalmen's Agreement), the "mechanic's" or "journeyman" class. Mr. Estes is also this Brotherhood's General Chairman, and has been since 1939.

Prior to July 1, 1958, Mr. Estes held a position of Relay Repairman at Columbus, Georgia, and he has maintained a residence at Columbus since 1946.

Under date of October 24, 1960, Mr. R. L. Teece, Signal Maintainer with headquarters at Phenix City, Alabama, made a written statement to the effect that he was told by a Carrier official while Mr. Estes was working as Relay Repairman at Columbus that if Mr. Estes did not quit handling all those claims against the Carrier his job as Relay Repairman would be abolished. Mr. Teece's witnessed statement is attached hereto as Brotherhood's Exhibit No. 1.

The Carrier's threat obviously did not deter Mr. Estes as he continued to perform his duties as General Chairman. On July 1, 1958, the Carrier abolished his position of Relay Repairman, and he bid on and was assigned to a position of Traveling Signal Maintainer at Macon, Georgia.

On August 12, 1958, the Carrier issued Bulletin No. J-9-58, advertising position of Traveling Signal Maintainer with headquarters at Columbus, Georgia, and Mr. Estes was assigned thereto by Bulletin J-12-58 of August 25,

"AWARD

"Claim denied."

Third Division Award 6379 (Kelliher):

"The Petitioner has failed to sustain its burden of proof to show a contract violation."

"AWARD

"Claim denied."

Third Division Award 6378 (Kelliher):

"Based upon an analysis of all the evidence, it must be found that the petitioners have failed to sustain the burden of proof and, therefore, claim is accordingly denied."

"AWARD

"Claim denied."

Third Division Award 5418 (Parker):

" * * * Under our decisions (see e.g., Award No. 4011) the burden of establishing facts sufficient to require or permit the allowance of a claim is upon him who seeks its allowance and where that burden is not met, a denial Award is required for failure of proof."

"AWARD

"Claim denied."

And there are many other Awards of the Board on this point, too numerous to mention.

In view of all the facts and circumstances shown by the Carrier in this Ex Parte Submission, Carrier respectfully requests the Board to deny this baseless claim in its entirety.

Carrier, not having yet seen the Employees' Ex Parte Submission, reserves the right, after the Employees have set forth their position to the Board, to present such additional evidence and argument as it deems necessary.

All facts submitted in support of Carrier's position in this case have been presented orally or by correspondence to the duly authorized representative of the Employees, and made a part of this dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: After carefully studying the record and the argumentation presented for and in behalf of the parties, we do not find the Carrier in violation of any rule of the effective Agreement.

During the period of time this grievance was handled on the property, the only medical information in the possession of Carrier was to the effect that

Claimant was physically fit for work as a signalman. This was the status of the matter when the final denial decision was made in the month of March, 1961.

Consequently, we cannot hold Carrier to be at fault when, acting upon the only competent medical evidence then available, it required Claimant to either exercise his displacement rights or forfeit his seniority rights and then subsequently declared grievant's seniority rights forfeited after he chose not to exercise his displacement privileges within the prescribed period of time.

The record reveals that after the dispute was handled to a conclusion on the property, it was referred to the President of the Organization for further handling. In an independent proceeding, the Railroad Retirement Board, an agency of the United States Government, made the adjudication that grievant was permanently disabled to perform work in his regular occupation, i.e., as a signalman. This decision, which was rendered in the month of October, 1961, granted Claimant a disability annuity retroactively effective as of the 17th day of September, 1960—this being the next day after the abolishment of grievant's position at Columbus, Georgia. Insofar as we know, said adjudication remains in full force and effect.

In reference to the physical condition of the Claimant, we accept the later decision of the Retirement Board as correct, viz., that as of the 17th day of September, 1960, Mr. Estes had become permanently disabled to perform the work of a signalman. It follows that Claimant's unproved allegation on the property, viz., that due to sickness and/or disability he was unable to exercise his displacement rights and should not, therefore, be deprived of his seniority rights, was not a false statement. In later months, as aforesaid, a responsible governmental department, after studying all of the medical data then available, found that grievant was in fact a disabled man as of the 17th day of September, 1960.

This Claim is not for monetary compensation; it is for the restoration of the seniority rights of the Claimant.

Although we do not find that the complained of action of the Carrier was in violation of the Agreement of the parties, we believe that in view of the later developments referred to above the seniority rights of the Claimant, who was born in 1898 and worked in the service of this Carrier for a long period of time, should be restored.

We believe that this is the most desirable solution to the peculiar problems of this case.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That Carrier did not violate the Agreement of the parties.

That the seniority rights of the Claimant should be and are restored—in view of the especial circumstances which arose in the latter phase of the chain of events pertinent to this dispute.

AWARD

Claim sustained—within the limitations set forth above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 14th day of June 1963.

DISSENT OF CARRIER MEMBERS TO AWARD NO. 11517, DOCKET NO. SG-13084

Award 11517 is in error in that the majority decided “* * * that due to sickness and/or disability he [J. R. Estes, Jr.] was unable to exercise his displacement rights and should not, therefore, be deprived of his seniority rights * * *” in the face of the record wherein the Chief Surgeon of the Railroad, following a thorough and complete physical examination in Carrier’s General Hospital at Savannah, Georgia, during period September 26-28, 1960, ruled “After carefully checking this individual, I found a few minor defects, but nothing was found to disqualify this man from further service. * * *.” The record shows that there were several physicians who examined J. R. Estes, Jr., in Carrier’s General Hospital at Savannah, in September, 1960, and such full and complete examination included X-rays, G.I. series tests, electro-cardiogram, and other tests. No medical evidence of any kind was presented by or on behalf of Claimant in September, 1960, that he was prevented by sickness or injury from asserting displacement rights. (Emphasis ours.)

The record likewise showed that Mr. Horace W. Harper, then member of the Railroad Retirement Board, Chicago, Illinois, notified J. R. Estes, Jr., by letter dated October 9, 1961, more than a year after Mr. Estes last worked, that “I am pleased to inform you that we have now received the report of your physical examination which was recently conducted by Dr. Dykes [A. N. Dykes, M.D., Columbus, Georgia] and based on the information contained therein, you have been found to be permanently disabled to perform work in your regular occupation. Your claim is being referred to our Bureau of Retirement Claims with a request that final handling be expedited.” (Emphasis ours.)

And yet during the interim, the record showed that “sickness and/or disability” benefits were not paid to Mr. Estes.

In the first paragraph of the “OPINION OF BOARD” the majority states:

“After carefully studying the record and the argumentation presented for and in behalf of the parties, we do not find the Carrier in violation of any rule of the effective Agreement.”

Rule 39 of the Signalmen’s Agreement reads as follows:

“Employees whose positions have been abolished, who have been laid off by reason of force reduction or who have been displaced, must

assert displacement rights within ten days from date of notice of abolishment, lay off, or displacement unless prevented from doing so by sickness or injury, or a leave of absence has been granted under the provisions of this agreement prior to date of notice affecting the employee.

"Employees failing to report for duty within ten days from the date they assert displacement rights forfeit all seniority rights except when prevented from doing so by sickness or injury or when granted leave of absence under the provisions of this agreement."
(Emphasis ours.)

Carrier ruled on the property that Claimant Estes forfeited all seniority rights when he failed to report for duty within ten days after it was determined that Estes was neither sick nor injured following Estes' visit and examination in Carrier's General Hospital in September, 1960. Yet, the majority goes on to state that

"Although we do not find that the complained of action of the Carrier was in violation of the Agreement of the parties, we believe that in view of the later developments referred to above the seniority rights of the Claimant, who was born in 1898 and worked in the service of this Carrier for a long period of time, should be restored."
(Emphasis ours.)

The sum and substance being that regardless of the rules between the Organization and the Carrier, the majority simply believes that "the most desirable solution" is to place Claimant's name back on the seniority roster.

The majority erred in disregarding the findings of Carrier's Chief Surgeon, which findings were based upon painstaking examinations and tests, and in lieu thereof wholeheartedly accepting the findings of the Railroad Retirement Board which were based on an examination of Dr. A. N. Dykes, Columbus, Georgia, made a year after Mr. Estes last worked. Neither the Claimant, the Petitioner, nor the Railroad Retirement Board has ever made known any details as to what Mr. Estes' alleged physical disability was based upon.

As the majority found that the Carrier did not violate any rule of the effective Agreement, the claim should properly have been denied. The majority, in reaching the decision it did in this dispute, has exceeded its authority in setting aside the ruling of the Carrier that Claimant Estes forfeited his seniority rights under Rule 39 of the effective Agreement.

For the reasons above stated, we dissent.

P. C. Carter

D. S. Dugan

W. H. Castle

T. F. Strunck

G. C. White

**ANSWER TO DISSENT TO AWARD 11517,
DOCKET SG-13084**

The gripe of the minority seems to stem from the fact that this case was disposed of on the basis of all of the facts contained in the record rather than certain portions of it. The Award is not in error and the Dissent serves no purpose other than to further muddy the water.

G. Orndorff

Labor Member